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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1388

SONIA HILYER (WIDOW OF JAMES H. HILYER),
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Respondents

And Consolidated Cases

Argued 3-19-81

Filed Jan. 14, 1982

Before: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Respondents/cross-petitioners' suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the Court has not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges MacKinnon, Wilkey and Ginsburg would grant rehearing *en banc*.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-1388

SONIA HILYER (WIDOW OF JAMES H. HILYER),
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Respondents

And Consolidated Cases

Argued 3-19-81

Filed Jan. 14, 1982

Before: Robinson, Chief Judge, Robb, Circuit Judge and Luther M. Swygert *, Circuit Judge, United States Court of Appeals for the Seventh Circuit

ORDER

On consideration of respondents/cross-petitioners' petition for rehearing, filed December 15, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1388

SONIA HILYER (WIDOW OF JAMES H. HILYER),
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Respondents

No. 80-1440

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Petitioners

v.

SONIA HILYER (WIDOW OF JAMES H. HILYER),
Respondent

No. 80-1504

DIRECTOR, OFFICE OF WORKERS' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Respondents

Petitions for Review of Orders of the
Benefits Review Board

Argued March 19, 1981

Decided December 1, 1981

Catherine A. Giacona, Attorney, Department of Labor, for Director, Office of Workers' Compensation Programs, Department of Labor, petitioner in No. 80-1504. *Joshua T. Gillelan, II*, Attorney, Department of Labor, also entered an appearance for Director, Office of Workers' Compensation Programs, Department of Labor.

Richard W. Galiher, Jr. for Morrison-Knudsen Construction Company, et al., petitioners in No. 80-1440 and respondents in No. 80-1504.

George S. Leonard for Sonia Hilyer, cross-respondent in No. 80-1440 and petitioner in No. 80-1388.

Before: ROBINSON, *Chief Judge*, SWYGERT,* *Senior Judge*, and ROBB, *Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SWYGERT.

SWYGERT, *Senior Circuit Judge*: In these consolidated appeals we are asked to review a final order of the Benefits Review Board of the United States Department of Labor. The case presents a question of first impression concerning construction of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1976), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501, 502 (1973) ("the Act" or "the Longshoremen's Act").

The claimant in this case is Sonia Hilyer. On April 19, 1974 her husband, James H. Hilyer, was

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* Of the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. 291(a).

fatally injured during the course of his employment with respondent Morrison-Knudsen Company.[1] At the time of his death, Hilyer was a member of Local 456 of the Laborers' District Council of Washington, D.C. and Vicinity, an AFL-CIO affiliate. In addition to the covered employees' hourly rates of pay, the collective bargaining agreement between the union and Morrison-Knudsen provided that the company would pay fixed sums of money into three union trust funds. Specifically, the company agreed to pay twenty-eight cents into the health and welfare fund, thirty-five cents into the pension fund, and five cents into the training fund, for each hour that each employee worked.

Morrison-Knudsen began paying death benefits under the Act to the claimant immediately upon her husband's death. A dispute arose, however, over the amount of benefits to which she was entitled. Hilyer had been employed by Morrison-Knudsen for only five months when he died. During the year before his death, he had also been employed as a security guard and a grocery clerk, at substantially lower wages. In figuring his average weekly wage, the company took into account his prior employment. The claimant contended that her husband's average weekly wage should be based only on his employment with Morrison-Knudsen. She also contended that the company's contributions to the three union trust funds should be included as part of her husband's "average weekly wage" under the Act.[2]

Following a hearing, an administrative law judge agreed with the claimant that the average weekly wage should reflect only the deceased's earnings as a construction worker for Morrison-Knudsen. Accordingly, pursuant

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[1] Morrison-Knudsen's insurer, the Argonaut Insurance Company, is also a respondent here.

[2] Under section 9 of the Act, death benefits are computed by reference to the average weekly wage of the deceased employee.

to section 10(b) of the Act, the average weekly wage was determined by reference to the average yearly wages of a fellow employee whose wages most closely resembled those of the deceased during the period he worked for Morrison-Knudsen.[3] The administrative law judge further ruled, however, that the contributions to the union trust funds were not includable in the average weekly wage. At the hearing, the claimant also presented a claim for attorney's fees pursuant to section 928 of the Act. Although she requested $7,530, the administrative law judge awarded a fee of $2,988.80.

On cross-appeals to the Benefits Review Board, the Board upheld the administrative law judge's ruling with respect to the amount of benefits to which the claimant was entitled. The Board rejected the company's contention that section 10(b) should not be applied, and also rejected the claimants' contention that fringe benefit payments should have been included in the average weekly wage. The Board remanded the case, however, ordering that the administrative law judge give detailed reasons for the substantial reduction of the attorney's fee award.

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[3] The relevant statutory language of section 10(b) reads:

Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

* * *

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

On remand, the case was assigned to a different administrative law judge.[4] The new administrative law judge increased the attorney's fee award to $4,000. The claimant again appealed to the Board, contending that the award was still inadequate. The Board modified the fee award to $6,215. Both parties thereafter petitioned this court for review of the Board's order. The claimant contends that the Board should have included the employer's trust fund contributions in computing her husband's average weekly wage; the company contends that the Board's modification of the attorney's fee award was clearly erroneous.

I

We address first the claimant's contention that the fringe benefits provided to her husband by means of the company's contributions to the union trust funds are a part of her husband's "average weekly wage" within the meaning of the Act. This issue has apparently not been addressed before. We begin our analysis with the specific language of the statute.

The term "wages" is defined at section 2(13) of the Act:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(13). We agree with the Board that this definition "clearly implies that values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage." App. I at 51. Thus, for example, vacation pay

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[4] The original administrative law judge had since left the Department of Labor.

constitutes wages, *Baldwin v. General Dynamics Corp.*, 5 BRBS 579, BRB No. 76-271 (March 15, 1977), as does overtime pay, *Gray v. General Dynamics Corp.*, 5 BRBS 279, BRB No. 76-105 (December 21, 1976), although neither is explicitly mentioned in section 2(13).[5] The question, then, is whether the benefit fund contributions are identifiable, calculable values received by the employees. We hold that they are.

We recognize that, as Morrison-Knudsen emphasizes, the contributions are made to the union funds, not to the employees, and that the individual employees have no voice in the day-to-day operation of the funds. The company cannot seriously maintain, however, that because the union funds receive the contributions, then the funds are the beneficiaries of the company's payments. The beneficiaries are the employees. The funds are no more than a channel; they are merely a means by which the company provides life insurance, health insurance, retirement benefits, and career training for its employees.

Further, it is indisputable that each of these benefits has substantial economic value to the employees. If they were not provided at the company's expense, each employee would have to spend his or her own money to acquire them. The Board apparently felt that it would be impossible to determine the "value" to an employee of the insurance policies, the career training, or the pension because whether and to what extent the employee might use them is highly speculative. This reasoning ignores the fact that an insurance policy must be bought and paid for whether or not a claim is ever made upon it. The economic advantage lies in the employer's provisions of such a policy at no cost to the employee. *See W. W.*

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[5] Similarly, transportation provided by the employer has been held to constitute "wages" under a state workers' compensation statute. *Leslie v. Reynolds*, 179 Ka. 422, 295 P.2d 1076, 1083 (1956).

Cross v. NLRB, 174 F.2d 875, 878 (1st Cir. 1949).[6] The same is true of the retirement pension and the career training. With respect to the pension, we agree with the Michigan appellate court's statement in *Hite v. Evart Products Co.*, 34 Mich. App. 247, 191 N.W.2d 136 (1971):

> We may only speculate whether plaintiff would have worked a full 10 years for defendant [and thereby obtained a vested interest in the pension fund] had she not been injured. However, the *facts* are that at the time of the injury her employer was putting aside this potential benefit for her and that the injury prevented a continuation of this potential toward a vested interest. As the result of her injury she must find some other way of providing income for retirement. The pension payment was a part of her weekly wage.

191 N.W.2d at 139 (emphasis in original).[7] As for career training, that too is something the employee would

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[6] In *W. W. Cross v. NLRB*, 174 F.2d 875 (1st Cir. 1949), the First Circuit held that contributions to a group health insurance plan were "wages" for purposes of the mandatory bargaining provision of the NLRA as amended, 29 U.S.C. §§ 151 *et seq.* The court stated:

> [T]he word "wages" in § 9(a) of the Act embraces within its meaning direct and immediate economic benefits flowing from the employment relationship. And this is as far as we need to go, for so construed the word covers a group insurance program for the reason that such a program provides a financial cushion in the event of illness or injury arising outside the scope of employment at less cost than such a cushion could be obtained through contracts of insurance negotiated individually.

Id. at 878. *See also Inland Steel v. NLRB*, 170 F.2d 247 (7th Cir. 1949).

[7] We have discovered only one other state court case that addresses the issue whether benefit fund contributions are part of an employee's average weekly wage for purposes of a workers' compen-

have had to spend his or her own money to acquire. It is therefore as much an economic advantage as are the insurance policies and the pension. That an employee may choose not to participate in the career training opportunity does not make the opportunity any less valuable, for it is of course up to each employee to decide what to do with the consideration tendered by the employer in return for services rendered.

The Supreme Court's reasoning in *United States v. Carter*, 353 U.S. 210 (1957), is instructive. In *Carter*, the Court found contributions of seven and one-half cents per hour to a union health and welfare fund to be part of the "sums justly due" to employees under the Miller Act, 40 U.S.C. §§ 270a *et seq.*, and held accordingly that a federal contractor's surety was liable for such contributions when the contractor failed to pay them. The Court stated:

> It is undisputed that if the collective-bargaining agreement had required the contractor to pay each

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sation statute. That case, *Still v. Industrial Comm'n*, 27 Ariz. App. 142, 551 P.2d 591 (1976), is in direct conflict with the Michigan court's holding in *Hite*, quoted in the text above. In *Still*, the Arizona court viewed benefit fund contributions as akin to year-end bonuses, in that the amount the employer paid per hour worked by each employee remained the same without regard to the employee's rank or rate of pay. The court concluded that the contributions did not constitute wages because they were not the result of the employee's "individual effort," but rather resulted from the "collective effort" of the union's negotiations with the employer. With respect, we find this "individual effort" analysis unhelpful. It is immaterial that the benefits were obtained through the collective bargaining process, or that the benefits do not change according to job classification or seniority while rates of pay do change according to those criteria. The fact remains that the employer has agreed to furnish the employees with valuable benefits, in addition to hourly rates of pay, in return for the employees' services. The contributions are an important part of the employees' total compensation, and an equally important part of the employer's labor cost.

> employee 7½ cents per hour above the prevailing wage rate, and the employee had, by contract with his bargaining representative, agreed to contribute that sum to the fund, the surety would have been obligated to make good any default in the contractor's payment of that extra 7½ cents per hour.

Id. at 217. The same logic applies here. If Morrison-Knudsen paid the sixty-eight cents per hour to its employees, and the employees, in turn, paid this amount into the various funds, the sixty-eight cents per hour undoubtedly would be seen as part of the employees' wages. That result does not change simply because the company has agreed to eliminate two unnecessary steps by paying the contributions directly to the trust funds.

It may be true, as the Board observed, that the sixty-eight cents per hour "would in all likelihood not buy decedent's family similar kinds of protection," App. I at 52, but the possible inadequacy of the contributions is no reason to withhold them altogether. Moreover, we think the above quotation from the *Carter* case supports the conclusion that the most reasonable course is to measure the value of the fringe benefits by the amount of the employer's contributions to the benefit funds. We are not persuaded by the Board's concern that "if contributions to the various funds were included in the average weekly wage, it would appear that to [calculate compensation payments under] section 10B, one would have to find a fellow employee who not only worked similar hours at a similar wage scale, but who had a similar status vis a vis union funds as well." App. I at 52. Such fears are unfounded. The benefit fund contributions are made on a per-hour basis for each employee, without regard to the employee's "status vis a vis union funds." Thus, the contributions may be included in the average weekly wage under section 10(b) simply by determining the amount of the contributions made on behalf of the fellow employee who, having

worked similar hours, serves as the referent in any event.

Finally, Morrison-Knudsen's reliance on *United States v. Embassy Restaurant*, 359 U.S. 29 (1959), is misplaced. There the Court held that under the Bankruptcy Act, benefit fund contributions are not entitled to the priority given to "wages . . . due to workmen." The Court emphasized, however, that the Bankruptcy Act gave priority strictly to wages, and that it was not intended to include additional forms of compensation. *Id.* at 35. Here, by contrast, the Longshoremen's Act is expressly defined to include many forms of compensation within the concept of "wages." Further, the purpose of the Bankruptcy Act is to set a formula for distributing too few assets among too many creditors. Part of the Court's concern in *Embassy Restaurant* was that if contributions were given priority along with wages, "the workman [would] have to share with the welfare plan, thus reducing his own recovery." *Id.* at 34. Such a consideration is wholly absent in the present context. The purpose of the Longshoremen's Act is to provide prompt compensation for injured employees or their families. Congress chose to carry out this design by including in the compensation formula *all* of the identifiable value, in whatever form it may appear, that the employee was receiving in return for his labor at the time of the injury. The Act is remedial, and we are obliged to construe it liberally, resolving doubts in favor of the claimant. *See, e.g., Friend v. Britton*, 220 F.2d 820 (D.C. Cir. 1955). The strict construction given to the term "wages" in *Embassy Restaurant* is therefore inappropriate here.

In conclusion, it is clear that if the value received by the employee is reasonably identifiable and calculable, then it must be included in the average weekly wage of the employee. We hold that the fringe benefits at issue here amount to value received by the employees, and

that it is reasonable to measure such value by the amount of the employer's contributions to the various fringe benefit funds. Therefore, those contributions must be included as part of the employee's average weekly wage in computing the compensation due under the Act. Accordingly, that part of the Board's decision concerning fringe benefits is reversed.

II

In its cross-petition for review of the Board's order, the company contends that the Board erred in modifying the amount of attorney's fees awarded by the administrative law judge. As the Board stated:

> After careful review and consideration of the entire record . . ., we find that the administrative law judge's award of the attorney's fee herein is an abuse of discretion and contrary to law. Normally, the Board would remand this case to the administrative law judge for a second time for reconsideration; however, since Judge Thomas' Decision was of necessity based only upon a review of the records, as would be any subsequent decision he could render, in the interest of administrative economy the Board modifies the attorney's fee award to $6215.00. . . .

The fee award made by the administrative law judge was for services performed in connection with the proceedings before him. The pertinent regulation provides as follows:

> An attorney or other representative seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act *shall make application thereof to the persons, administrative body, or court before whom the services were performed.*

20 C.F.R. § 701.132 (emphasis added). The company contends that the Board, in modifying a fee award for

services performed before the administrative law judge, violated its own regulation. We disagree.

Initially, we note that the claimant's attorney complied with the requirement set out in the regulation: her attorney applied to the administrative law judge for attorney's fees for services performed before it.[8] Nothing in the regulation prohibits the Board from reviewing or revising the award set by the administrative law judge.

It is clear that the Board has the authority to review and reverse an administrative law judge's fee award if that award was an abuse of discretion. *Director, Office of Workers' Compensation Programs v. United States Steel Corp.*, 606 F.2d 53, 55 (3d Cir. 1979). The issue presented in the instant case is, however, more difficult: can the Board modify a fee award set by an administrative law judge rather than remand the case if the Board finds that award to be erroneous and an abuse of discretion. We find that the Board had such authority in this case where the determination of attorney's fees was properly based solely on the record, and the complete record was before the Board.[9] In its order,

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[8] The fees awarded by the Board for services performed in connection with proceedings before it are not at issue in this appeal.

[9] The instant case is distinguishable from *Director, Office of Workers' Compensation Programs v. United States Steel Corp.*, 606 F.2d 53 (3d Cir. 1979). In that case, the Board modified the fee award set by the administrative law judge, and the court of appeals reversed, finding that the Board exceeded its authority in modifying the award because the record did not contain "sufficient findings" on which the Board could have based its determination of the award. The court noted, however, that it was not deciding "the question of whether the Board may, when presented with a full factual record, draw an appropriate conclusion from that record." *Id.* at 56 n.12.

The other cases cited by the company are also inapposite. In *Ayers S.S. Co. v. Bryant*, 544 F.2d 812 (5th Cir. 1977), the claimant's attorney apparently applied to the court for fees for services performed before the court and the administrative law judge. The

the Board discussed the factors to be considered in determining a fee award and applied those factors to the information contained in the record regarding attorney's fees. We therefore agree with the Board that since the full record was before it, the policies of administrative economy and a speedy resolution of this claim were furthered by the Board's decision to modify the fee award rather than remand for a second time to the administrative law judge. Accordingly, we affirm the Board's award of attorney's fees.

The order appealed from is affirmed in part and reversed in part, and the case is remanded to the Benefits Review Board for further proceedings consistent with this opinion.

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court refused to award fees for work performed before the administrative law judge. The court did not discuss the question whether a fee award is subject to modification by the reviewing body. Similarly, in *Newport News Shipbuilding & Dry Dock Co. v. Director, Office of Workers' Compensation Programs*, 594 F.2d 986 (4th Cir. 1979), the court held that, according to the regulation, the claimant's attorney must apply separately to the deputy commissioner, administrative law judge, Board, or the court for fees generated by services performed before that person or body.

APPENDIX D

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR
Washington, DC 20036

SONYA HILYER (WIDOW OF JAMES H. HILYER),
Claimant-Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Employer/Carrier-Respondents

Filed as Part of the Record Mar. 19, 1980

BRB No. 78-568

DECISION AND ORDER

Appeal from the Decision and Order of Everette E. Thomas, Administrative Law Judge, United States Department of Labor.

George S. Leonard, Alexandria, Virginia, for the claimant.

Richard W. Galiher, Jr. (Galiher, Clarke, Martell and Donnelly), Washington, D.C., for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by the claimant from the Decision and Order on Remand (76-DCWC-158) of Administrative Law Judge Everette E. Thomas, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as

extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 *et seq* (hereinafter, the Act).

This case was originally heard by Administrative Law Judge David W. Pelkey. Judge Pelkey awarded death benefits based on an average weekly wage computed under Section 10(b) of the Act. 33 U.S.C. § 910(b). He further concluded that certain fringe benefits were not includible in the determination of claimant's average weekly wage. He also awarded an attorney's fee to claimant's attorney. However, this fee was reduced from the $7,472.00 requested to $2,988.80. Employer appealed the administrative law judge's determination of average weekly wage under Section 10(b); claimant appealed the exclusion of fringe benefits from average weekly wage and the substantial reduction of the attorney's fee.

On appeal, the Board affirmed the administrative law judge's findings on average weekly wage but remanded the case for a detailed explanation of the substantial reduction of the attorney's fee. *Hilyer v. Morrison-Knudsen Construction Co.*, 6 BRBS 754, BRB Nos. 76-410/A (1977).

The case on remand was assigned to Administrative Law Judge Everette E. Thomas inasmuch as Judge Pelkey was no longer with the Department of Labor. Judge Thomas reconsidered the fee request and awarded claimant's attorney a fee of $4,000.00 based upon a review of the record.

On appeal, claimant contends that the administrative law judge's substantial reduction of the attorney's fee requested is an abuse of discretion and contrary to law. The amount of an attorney's fee award is discretionary. An award may be set aside only if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Offshore Food Service, Inc. v. Murillo*, 1 BRBS 9, BRB No. 73-141

(1974), *aff'd sub nom. Offshore Food Service, Inc. v. Benefits Review Board*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975). In setting the amount of an attorney's fee, the administrative law judge should take into consideration the number of hours worked, the results obtained, the complexity of the case, the quality of the services, by whom the services were performed, and the prevailing rate for attorney in the area. *See* 20 C.F.R. § 702.132; *Palacios v. Campbell Industries*, 3 BRBS 37, BRB No. 75-190 (1973).

After careful review and consideration of the entire record and the foregoing principles, we find that the administrative law judge's award of the attorney's fee herein is an abuse of discretion and contrary to law. Normally, the Board would remand this case to the administrative law judge for a second time for reconsideration; however, since Judge Thomas' decision was of necessity based only upon a review of the record, as would be any subsequent decision he could render, in the interest of administrative economy, the Board modifies the attorney's fee award to $6,215.00. *See e.g. Linnell, Choate and Webber v. Heyde*, 330 F. Supp. 170 (D. Me. 1971); *McCormick ex rel. Kierr and Gainsburgh v. Donovan*, 247 F. Supp. 175 (E.D. La. 1965); *Di Costanzo v. Willard*, 165 F. Supp. 533 (E.D. N.Y. 1958); *Di Costanzo v. Willard*, 165 F. Supp. 540 (E.D.N.Y. 1958).

The administrative law judge's analysis does not clearly set forth the basis for his substantial reduction of the attorney's fee award. In reducing the award, the administrative law judge noted that the rate charged for counsel's law clerks, $32.00 per hour, was excessive; however, he did not indicate what he considered to be a reasonable rate. While the administrative law judge concluded that there was duplication of effort among the law clerks and between the law clerks and claimant's counsel, and that an extensive amount of time was devoted to research, he did not indicate how many of the hours charged for the law clerks' services were reasonable.

The Board finds that $25.00 per hour is a reasonable fee for the services of the law clerks. As to the question of duplication of effort among the lawclerks, a review of the fee request reveals that only entries for a total of five hours for June 29, 1976 and July 2, 1976 appear to be duplications. Thus, the amount requested as compensation for the services of counsel's law clerks should be reduced by five hours to eliminate this duplication. A review of the attorney's fee application reveals that 43.5 hours of the 84 law clerk hours charged were devoted to research. The Board finds that half of the law clerk hours charged to research were reasonably necessary herein so that the amount of law clerk hours should be further reduced by 21.75 hours. This reduction in hours plus the reduction of the five hours of duplication results in total allowable law clerk hours of 57.25. At $25.00 per hour, this results in a total allowable fee for the law clerks' services of $1,431.00.

The fee request also encompassed the charge of $4,784.00 based on 74.75 attorney hours at $64.00 per hour. The Board finds that both the hourly rate and the number of hours billed are reasonable and should be allowed. In awarding significantly less than the amount requested, the administrative law judge apparently concluded that an excess amount of time was devoted to research. Implicit in the administrative law judge's decision is the conclusion that, since there is little authority on the issue of whether fringe benefits are includible in determining average weekly wage, this issue warranted little research. We do not find this reasoning persuasive. Rather, the fact that this area of law is not well settled would warrant extensive research. Also implicit from the decision and order is the finding that since claimant was unsuccessful on the fringe benefit issue, claimant's attorney fee should be reduced. Neither Section 28(b) of the Act, 33 U.S.C. § 928(b), nor the applicable regulation, 20 C.F.R. § 702.132, limits the attorney's fee awarded to work on those issues on which the claimant prevails. *Cherry v. Newport*

News Shipbuilding and Dry Dock Co., 8 BRBS 857, BRB Nos. 77-562/A (1978). In *Cherry*, the Board concluded that attorneys should be compensated for necessary work and that work done on unsuccessful issues should not automatically be considered unnecessary. Rather, *Cherry* set forth the proposition that necessity should be considered from claimant's counsel pre-hearing viewpoint so that counsel should be compensated for work on issues that "must necessarily be raised in order to adequately protect a claimant's interest." 8 BRBS at 863. Accordingly, claimant's attorney's fee should not be reduced because claimant did not prevail on the fringe benefit issue.

While the administrative law judge concluded that there was duplication of effort between claimant's counsel and his law clerks, a review of the fee request reveals that this duplication is not sufficiently extensive to justify a reduction of the hours charged by counsel. Further, minimal duplication is essential for counsel to supervise the work of the law clerks.

Accordingly, since the Board finds that claimant's counsel should be compensated for all of the attorney hours charged, the attorney's fee award herein is modified to $6,215.00, based on 74.75 attorney hours at $64.00 per hour and 57.25 law clerk hours at $25.00 per hour.

Claimant's attorney has also requested approval of a fee for services rendered before the Board. This fee request is for $3,515.00 for 37 hours at a rate of $95.00 per hour, which includes time spent presenting oral argument before the Board. This fee request is based on counsel's hourly charges for the year 1976, ranging from $85.00 per hour for office time to $115.00 per hour for court time. Counsel averaged these rates to arrive at a fee of approximately $95.00 per hour.

We cannot agree with the averaging of rates. The Board finds that $85.00 per hour is a reasonable charge for counsel's office work. It should not be inflated by averaging. In addition, $115.00 per hour is a reasonable

fee for court time. The Board will allow this hourly rate for time spent presenting oral argument. In making this award, we recognize the experience of counsel.

Counsel billed 28 hours for review of the record, preparation of claimant's Petition for Review and brief, and preparation of claimant's response to employer's Petition for Review. Inasmuch as the issues on appeal had been fully developed before the administrative law judge, we conclude that 18 hours is a reasonable amount of time for this activity. Counsel also requested four hours to review the Director's brief. Counsel did not respond to this brief, which supported claimant's position. Two hours for this activity is reasonable. Finally, of the five hours counsel requested for preparation and presentation of oral argument, we find that two hours should be charged at the office time rate and three hours should be charged at the court time rate. Thus, a fee of $2,215.00 is awarded to claimant's attorney for services before the Board. This is based upon 22 allowable hours of office time at $85.00 per hour and three allowable hours of court time at $115.00 per hour.

Accordingly, claimant's attorney is awarded a fee for services before the Board and claimant's attorney's fee for services performed in the proceedings below is modified to conform with this Opinion.

SO ORDERED.

/s/ Samuel J. Smith
SAMUEL J. SMITH
Chief Administrative Appeals Judge

/s/ Julius Miller
JULIUS MILLER
Administrative Appeals Judge

/s/ Ismene M. Kalaris
ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 19th day of March 1980

APPENDIX E

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-DCWC-158

BRB Nos. 76-410 and 76-410A

OWCP No. 40-82056

In the Matter of

JAMES H. HILYER (DECEASED)
SONYA HILYER (WIDOW)
Claimant

against

MORRISON-KNUDSEN CONSTRUCTION CO.
Employer

and

ARGONAUT INSURANCE COMPANY
Carrier

George S. Leonard, Esquire
6207 Tally-Ho Lane
Alexandria, Virginia
Counsel for Claimant

Richard W. Galiher, Jr., Esquire
1215 Nineteenth Street, NW
Washington, DC
Counsel for Respondents

Before:

EVERETTE E. THOMAS
Administrative Law Judge

DECISION AND ORDER ON REMAND

This is a decision and order on remand of the captioned Matter from the Benefits Review Board's Decision of November 30, 1977, which followed an appeal from the Decision and Order of Administrative Law Judge David W. Pelkey in a claim filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*, as extended to the District of Columbia, 36 D.C. Code § 501 *et seq.* (hereafter, the "Act"). The matter was initially assigned to Judge Pelkey upon remand and was reassigned to the writer upon Judge Pelkey's resignation as an Administrative Law Judge. A prehearing conference was held with counsel for the parties on September 6, 1978 to determine the need for a supplemental hearing. It was agreed by Mr. Leonard and Mr. Galiher that a supplemental hearing was unnecessary because no additional evidence was to be presented by either side.

At the prehearing conference Mr. Galiher pointed out that a separate hearing was held on the issue of attorney's fee on August 27, 1976. (Tr. 48). His position is that the matter was remanded only for an explanation of the amount of fee awarded. Mr. Leonard argued that a complete redetermination of the fee could be made on remand. It is the undersigned's opinion that Mr. Leonard's position is correct. The memoranda of law filed by both parties have been carefully considered even though the brief for Counsel for Employer was filed beyond the date set.

Findings of Fact and Conclusions of Law

Judge Pelkey found that Employer was making voluntary payments from the date of injury based upon an average weekly wage of $205.92. Applying Section 10(b) of the Act, he determined that Claimant's average weekly wages were actually $289.00. The Benefits Review Board affirmed this determination.

In awarding an attorney's fee, Judge Pelkey properly considered Section 10(b) of the Act, which requires that only the difference between the amount tendered or paid and the amount awarded may be considered. However, he failed to explain the considerations which prompted him to reduce the fee from the $7,530 requested to the $2,988.80 awarded.

Under the circumstances, I find that the most sensible option to resolve the fee question is to reevaluate the services rendered after a review of the record. Mr. Pelkey is no longer sitting as an administrative law judge and he is therefore not available to state his reasons for the fee reduction. Even if I could determine how he arrived at the amount of $2,988.80, which I cannot, I still would be engaged in speculation. I therefore make the following determination based on a careful review of the record; an analysis of the issues; the evidence presented; and the arguments of counsel.

The fee request presented by affidavit filed August 27, 1976, covers all services from the date of engagement at the deputy commissioner level to the Decision of Administrative Law Judge Pelkey. Mr. Leonard's hourly rate for such services was $64 and that of his law clerks was $34. Considerable time was devoted to research on the issue of fringe benefit inclusion in average weekly wage determination,[1] however this argument was unsuccessful.

Considering the work done, the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded, I find the total amount requested to be rather excessive. If the justification for using law clerks is to reduce costs, then that purpose is frustrated by assigning an hourly rate nearly equal to the prevailing rate for experienced attorneys. Such rates are

[1] Although Mr. Leonard estimated that the fringe benefit research required only 10% of the total time billed, it appears that this was the more difficult of the two questions presented.

particularly questionable in the Washington Metropolitan Area where there is no shortage of legal talent. Furthermore, there appears to be some duplication of effort among the law clerks and between the clerks and Mr. Leonard. Also, much time was apparently devoted to legal research, yet the available authority on the principal issue, i.e. inclusion of fringe benefits in average weekly wage determination, is rather limited.

However, assuming that at least a substantial amount of the total time charged was reasonably necessary to obtain the resulting benefits, it appears that the amount awarded by Judge Pelkey was rather conservative. Considering the expertise of counsel, the legal work involved and the benefits obtained, I find that $4,000 is an adequate amount to compensate counsel. This amount is awarded for services before the deputy commissioner as well as at the formal hearing level,[2] but does not include an award for services before the Benefits Review Board. Such amount includes the time charged for the law clerks.

ORDER

Accordingly, it is hereby ordered that Respondents pay directly to George S. Leonard, Esquire, the sum of $4,000 for services rendered.

/s/ Everette E. Thomas
EVERETTE E. THOMAS
Administrative Law Judge

Dated: 10/5/78
Washington, DC

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[2] The case of *Fino v. Bethlehem Steel Corp.*, 5 BRBS 223, BRB No. 76-128 (December 17, 1976), was modified by the Board's Decision in *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, —— BRBS ——, BRB No. 78-237 (June 30, 1978).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 77-2076

SONIA HILYER (WIDOW OF JAMES H. HILYER),
Petitioner

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY &
ARGONAUT INSURANCE COMPANY,
Respondents

And Consolidated Case No. 78-1087

Filed Jul. 19, 1978

Before: Fahy, Senior Circuit Judge; MacKinnon, Circuit Judge

ORDER

On consideration of the motion to consider jurisdiction and of the response thereto, it is

ORDERED by the Court that the petitions for review herein are dismissed for lack of jurisdiction. See *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976).

This action is without prejudice to the filing of valid petitions upon completion of the administrative proceedings.

Per Curiam

APPENDIX G

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

Filed as Part of the Record Nov. 30, 1977

BRB Nos. 76-410
and 76-410A

SONYA HILYER (WIDOW OF JAMES H. HILYER),
Claimant-Petitioner
Cross-Respondent

v.

MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,
Employer/Carrier-Respondents
Cross-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest

DECISION

Appeal from the Decision and Order of David W. Pelkey, Administrative Law Judge, United States Department of Labor.

George S. Leonard, Washington, D.C., for the claimant.

Richard W. Galiher, Jr. (Galiher, Clarke, Martell and Donnelly), Washington, D.C., for the employer/carrier.

Linda L. Carroll (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington,

D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Smith, Chairman, Hartman and Miller, Members.

Hartman, Member:

These are appeals by the claimant and the employer/carrier from a Decision and Order (76-DCWC-158) of Administrative Law Judge David W. Pelkey pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended to the District of Columbia, 36 D.C. Code § 501 *et seq.* (hereafter referred to as the Act).

James H. Hilyer who had begun working on a construction project for employer on November 7, 1973 was fatally injured during the course of his employment on April 19, 1974. Employer voluntarily paid death benefits to decedent's widow (claimant) since April 20, 1974, based upon an average weekly wage of $205.92. Employer reached this figure by adding together all of decedent's wages for the year preceding his fatal injury, and dividing the total by fifty-two weeks. In the year before his death, decedent had worked at lower paying jobs as a security guard and as a grocery clerk. Claimant however contended that the average weekly wage should be based on decedent's work in construction, and should reflect not only his salary but also the contributions made by employer to union pension, health and welfare, and training funds. The deputy commissioner agreed with the employer's method of calculating the average weekly wage. Following a hearing on these issues, the administrative law judge determined that decedent's average weekly wage should reflect only decedent's earnings as a construction worker. Accordingly, the administrative law judge pursuant to Section 10(b) of the Act, 33 U.S.C. § 910(b), based decedent's average weekly wage on the annual wages of a fellow employee

whose wages most closely resembled decedent's during the period he worked for employer. The administrative law judge did not apply Section 10(a) of the Act as decedent had not worked a full year in this or similar employment prior to his injury. The administrative law judge however rejected claimant's contention that employer's contributions to the union pension, health and welfare, and training funds were part of the average weekly wage.

Employer/carrier (hereafter the employer) appeal contending that decedent's average weekly wage should have been calculated under Section 10(c) of the Act and reflect all his earnings in the year prior to his injury. Claimant appeals contending that employer's contributions to union pension, health and welfare, and training funds should have been included in decedent's average weekly wage. Claimant also contends the attorney's fee awarded was inadequate. Claimant's attorney had requested a fee of $7,472. The administrative law judge awarded $2988.80 pursuant to Section 28(b) of the Act. 33 U.S.C. § 928(b).

Inasmuch as decedent had not been employed by employer or a similar employer for a year preceding his fatal injury, Section 10(a) of the Act which requires such a pre-condition is inapplicable. 33 U.S.C. § 910(a). Therefore, decedent's average weekly wage must be determined either pursuant to Sections 10(b) or (c) of the Act. 33 U.S.C. §§ 910(b), 910(c).

Section 10(c) gives the administrative law judge discretion to determine an injured employer's "actual earning capacity" at the time of the injury. Employer argues decedent's "actual earning capacity" was represented by all his earnings for the year prior to his injury, and not just by the wages earned at construction work.

However, Section 10(c) has traditionally been applied in cases where the injured employee's employment at the

time of injury was "intermittent and discontinuous in nature" and not calculable under Sections 10(a) or (b), or where calculations under Sections 10(a) or (b) would lead to a result contrary to the humanitarian purpose of the Act. *See O'Hearne v. Maryland Casualty Co.*, 177 F.2d 979 (4th Cir. 1949). There has been no proof shown that decedent's work at the time of injury was "intermittent and discontinuous in nature." Moreover, Section 10(b) could clearly be applied in this case, and render a just average weekly wage fully in keeping with the policy behind Section 10 of arriving at a fair and reasonable determination of claimant's average weekly wage. Employer however argues that under controlling case law in the District of Columbia Circuit, average weekly wage should be based on all earnings for the year prior to injury and not solely on the employment at the time of injury. This argument must be rejected. In this argument, employer relies heavily on language found in *Liberty v. Britton*, 233 F.2d 699 (D.C. Cir. 1956). However, in *Liberty*, the court stressed that the average weekly wage of claimant injured at one employment who also worked a part-time job should reflect all his earnings *at the time of injury*. Clearly, this case is in accord with *O'Hearne, supra*, which expressed that compensation should be based on claimant's *true* earning capacity *at the time of injury*, and not on prior jobs that do not completely reflect his wage-earning capacity at the time of injury.

Claimant argues that the average weekly wage should have included employer's contributions to union health and welfare, pension and training funds.

Section 2(10) [sic] of the Act, 33 U.S.C. § 902(10), [sic] defines wages as:

> . . . the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable

> value of board, rent, housing, lodging or similar advantage received from employer, and gratuities received in the course of employment from other than the employer.

This language clearly implies that values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage. Accordingly, under this definition, the Board has held that such things as overtime [*Gray v. General Dynamics Corp.*, 5 BRBS 279, BRB No. 76-105 (Dec. 21, 1976)] and vacation pay [*Baldwin v. General Dynamics Corp.*, 5 BRBS 579, BRB No. 76-271 (March 15, 1977)] can be included in the determination of the average weekly wage.

These decisions must be contrasted with the Board's decision in *Collins v. Todd Shipyards Corp.*, 5 BRBS 334, BRB No. 76-177 (Jan. 5, 1977) where it agreed with an administrative law judge's conclusion that contributions by an employer to a Health and Welfare Fund and a pension fund should not be included in the determination of the average weekly wage. The administrative law judge in that case stressed the speculative value of these contributions noting that such contributions did not directly flow to the employee. Rather, he has a vested right in these funds only if "he becomes ill or is injured in a non-job related illness or accident; [or if] he is eligible for a retirement pension." He further noted these contributions were not immediately includable in the employee's gross salary.

In the instant case, the record does not reflect whether decedent's rights in the pension had vested. Even if they were vested, inclusion of the contributions to the pension fund reflects a belief that the employee would also continue to work for employer and build up his pension. As for the health and welfare program, this is contingent on an illness occurring. In the case before us, it is ar-

gued that it should be determined if as a result of decedent's death, his family has lost the protection of his health benefits. Thus, the actual value of the health and welfare program is dependent on their possible use of it. Further, the amounts contributed by employer would in all likelihood not buy decedent's family similar kinds of protection. As for the training program, there is no indication decedent took advantage of it or was going to take advantage of it. Any value of the training program is highly speculative.

Therefore, it is clear that in this case that an employee's right to these funds and the actual value of them to the injured employee is highly speculative. Moreover, inclusion of these forms of benefits would actually appear to preclude the ready application of Section 10(b) of the Act. Under Section 10(b), the average weekly wage is not based on the injured employee's earnings but on the earnings of a fellow employee of the same class. However, if contributions to the various funds were included in the average weekly wage, it would appear that to apply Section 10(b), one would have to find a fellow employee who not only worked similar hours at a similar wage scale, but who had a similar status vis a vis union funds as well. This approach would render Section 10(b) useless in many cases, and would negate part of the statutory scheme.

Accordingly, the Board concludes that the administrative law judge did not err in concluding that employer's contributions to the union pension, health and welfare, and training funds should not be included in a determination of an injured employee's average weekly wage.

Claimant also argues that the administrative law judge's award of the attorney's fee was inadequate given the number of hours claimant's attorney spent on the case.

Claimant's attorney requested a fee of $7,530 based on 74.5 hours of his own time at $65 an hour and 84 hours of his law clerk's time at $32 an hour. A hearing was held below on this fee request. At the hearing, employer's primary objections were aimed at a fee based upon time spent at the administrative level, time spent researching the issue of fringe benefits, and the excessive number of hours and hourly rate for the law clerks. Claimant's attorney was awarded a fee of $2,988.80 pursuant to Section 28(b) of the Act, 33 U.S.C. § 928(b). No explanation was given for the size of the fee award.

The administrative law judge's award of an attorney's fee can be overturned only if the fee was not in accordance with law or was arbitrary, capricious or an abuse of discretion. *See Offshore Food Service, Inc. v. Murillo*, BRB No. 73-141 (May 19, 1974), *aff'd, Offshore Food Service, Inc. v. Benefits Review Board*, 524 F.2d 967 (5th Cir. 1975). Given the many variables in this case, the Board cannot adequately determine on review whether the fee ultimately awarded was proper. Particularly helpful to an adequate review of this issue would be specific discussion by the administrative law judge of the factors on which he based his fee award including whether the fee encompassed work done at the administrative level [*See Fino v. Bethlehem Steel Corp.*, 5 BRBS 223, BRB No. 76-128 (December 17, 1976)], whether the fee included the work done on the issue of whether fringe benefits should be included in the average weekly wage, whether the hours spent by the law clerks were included in the fee award, and what he viewed as a reasonable hourly rate for the law clerk's work. [*See Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs*, 545 F.2d 1177 (9th Cir. 1976)].

Accordingly, the case must be remanded for a more complete analysis of the issue of attorney's fee. In all other respects, the Decision and Order below is affirmed.

/s/ Samuel J. Smith
SAMUEL J. SMITH
Chairman

/s/ Ralph M. Hartman
RALPH M. HARTMAN
Member

/s/ Julius Miller
JULIUS MILLER
Member

Dated this 30th day
of September, 1977

APPENDIX H

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-DCWC-158

OWCP No. 40-82056

In the Matter of:

JAMES H. HILYER (DECEASED),
Claimant

v.

MORRISON-KNUDSEN CONSTRUCTION CO.,
Employer

SELF-INSURED

GEORGE STEPHEN LEONARD, ESQUIRE
Leonard, Glammer & Flues
1019 - 19th Street, N.W.
Washington, D.C. 20036
For the Claimant

RICHARD W. GALIHER, ESQUIRE
1215 - 19th Street, N.W.
Washington, D.C. 20036
For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

DECISION AND ORDER

Claimant Sonia Hilyer seeks compensation, in the form of death benefits, as the widow and for the minor children of James H. Hilyer (decedent), and attorney's fee under

the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, as amended, 36 D.C.C. 501 *et seq.* Hereafter, those acts are cited as the Act. This Decision and Order follows July 1 and August 27, 1976, hearings that were conducted in accordance with 5 U.S.C. 554. At the first hearing, the parties represented that they had reached agreements as to the issue to be adjudicated and as to facts to be taken as admitted. Those agreements, framed as stipulations, follow:

Stipulation Issue to be Adjudicated

Whether the average weekly wages of decedent, who worked as a laborer for Employer for 5 months and 13 days immediately prior to a fatal injury, but who worked as a food clerk and a security guard (for two other employers) for the balance of the year immediately preceding the injury, are to be computed in accordance with the provisions of 33 U.S.C. 910(a).

Stipulation of Facts to be Taken as Admitted

1) On April 19, 1974:

A) Decedent was regularly employed by Employer as a laborer and performed assigned duties in the District of Columbia (District);

B) Employer, in the usual course of business, carried on employment in the District;

C) While performing assigned duties, at the time and place designated for such performance, decedent sustained an injury.

2) As a result of the April 19 injury, decedent expired on April 21, 1974.

3) At the time of the death of decedent, Sonia Hilyer was his wife and was living with him as his wife.

4) At the time of the death of decedent, he and Sonia Hilyer were the parents of James H. Hilyer, Jr., born November 30, 1966, and Bryan M. Hilyer, born May 7, 1970.

5) As a result of the death of decedent, Employer has paid death benefits, under the Act, to his widow and minor children at a weekly rate of $137.28 (based on average weekly wages totalling $205.92) since April 20, 1974.

6) The $205.92 amount represents a wage computation effected by Employer in accordance with its stated understanding of the requirements of the Act.

Prior to the initial hearing, Claimant sought production of records of earnings of decedent and earnings of any individual employed by Employer, between April 1973 and April 1974, "of the same class of worker and member of the same Union and Local" as decedent. Employer responded that it would produce documents covering employees in the quoted class only on order of an "Administrative Law Judge pursuant to regulations." The response stated that Employer would produce statments that would show decedent's "earnings in this and other occupations during the 52 weeks prior to his injury;" that such information is required for computation of average weekly wages under 33 U.S.C. 910(a) (10(a)); that such statutory provision is proper for use in the instant claim; and that information bearing on "what an employee of the employer made who worked for the *entire* 52 weeks prior to the injury is irrelevant."

The document-production issue was not resolved when the July 1 hearing opened. Oral arguments were submitted by the parties. Claimant submitted that wage computation properly was to be accomplished in accordance with the provisions of 33 U.S.C. 910(b) (10(b)) or 910(c) (10(c)). Employer submitted that wage computation properly was to be accomplished in accordance with the provisions of 10(a).

In pertinent parts, 33 U.S.C. 910 provides:

"(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

"(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earning if a six-day worker, shall consist of three hundred times the average daily wage or salary and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

"(c) if either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reason-

ably represent the annual earning capacity of the injured employee.

"(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."

Evidence adduced during the hearing and arguments established that decedent worked for Employer as a laborer for approximately 5 months immediately preceding his April 19 injury. It established that, for the remainder of the immediately preceding 12 months, he worked for two other employers as a security guard and as a food clerk.

The administrative law judge noted that, in a usual and ordinary sense, "employment" is defined as vocation, trade or profession (an occupation by which a person earns a living). Application of that definition to the quoted 10(a) resulted in his determination that the provision would control determination of decedent's wages only if he had worked as a laborer for substantially the whole of the pertinent year. The evidence revealed that decedent had not so worked. Accordingly, the administrative law judge ruled that, absent a showing of cause why "employment" should not be considered in the usual and ordinary meaning, 10(a) is not for application herein. He ordered that Employer furnish Claimant documents suitable for computation of wages according to the provisions of 10(b). Additionally, he ruled that, assuming for purpose of example that 10(a) was proper for application herein, the documentation tendered by Employer was unacceptable because it covered work as a laborer, a security guard and a food clerk. Again, absent a showing of cause why "employment" should not be considered in its usual and ordinary sense, he ruled, 10(a) required documentation relating only to work as a laborer.

Employer took exceptions to the rulings and order, indicated an intention to comply therewith and requested leave

to submit a brief in support of its request that the rulings and order be reconsidered. Leave was granted.

At that July 1 hearing, Sonia Hilyer testified as to decedent's marriage, children, employment, earnings, and union membership. For her, a business agent of decedent's union testified as to membership, benefits derived therefrom and Employer's contributions to health and welfare, pension and disability, and training trust funds that are administered by the union. For Employer, an employee of an insurance adjuster testified as to the manner in which she computed the $205.92 on which Employer based the $137.28 death benefit payments that have been made to the widow and children of decedent.

Employer's brief was filed on August 6, 1976, and Claimant's reply brief was filed on August 17. In Employer's brief, the firm was read as having abandoned the posture that 10(a) guidelines are proper for application herein. Outright rejection of that posture was evidenced by the submission of a reason "why 10(a) and 10(b) should not be forced in a case such as this." Employer's abandonment and rejection of its 10(a) posture were read as abandonment and rejection of its challenges to be the July 1 rulings of the administrative judge relating to 10(a). The rulings, now considered to be unchallenged, are unchanged.

On brief, Employer was read as having adopted a posture that it rejected at the July 1 hearing. Employer was read as proposing that 10(c) guidelines are proper for application herein. This new posture was considered as a challenge to an unequivocal July 1 ruling that wage computation be effected pursuant to 10(b). That the July 1 ruling was not so unequivocal is evidenced by a statement the administrative law judge made relative to developments following the submission of 10(b) documents by Employer:

> "Then, if it develops the information submitted under 10(b) is determined not to be a fair and rea-

sonable basis on which to determine the deceased's average weekly wages, at that point we go to 10(c), as I see it. This is the posture I am taking in this matter.

"Mr. Galiher: We will argue on that, I am sure." (Transcript, pg. 20, lines 12-17).

Under the Act, 10(c) documents are proper for consideration only after a determination that 10(a) and 10(b) guidelines "cannot reasonably and fairly be applied." Accordingly, the administrative law judge read Employer's brief as offering support for the proposition that, because application of 10(c) guidelines is so patently proper herein, no consideration need be given to 10(b) guidelines.

The factual position Employer submitted for consideration in wage determination is reflected by the following statements on brief:

"In the present situation, we have laborers who work sometimes 40 hours a week and sometimes less. In the case of the decedent, most of the time it appeared that he also worked overtime but his work was discontinuous in that he did not work the full year in laboring employment" (pg. 5, lines 1-4).

"In the present case of decedent, James H. Hilyer, although other employees were employed substantially the whole year, James H. Hilyer's employment was for a discontinuous period" (pg. 5, lines 20-22). "All employments have been included in compliance with the fairness test set forth in 10(c)" (Pg. 5, lines 24-25).

In support of its factual submission, Employer cited cases, as follows:

A) *Rex v. Collura*, 329 F. Supp. 696 (1971), wherein the court found that the Claimant's work as a watchman "was clearly of an 'intermittent and discontinuous' na-

ture." Because such work was intermittent and discontinuous in nature, computation under 10(c) was found to be proper.

B) *Mahony v. Marshall*, 46 F.2d 539 (1931), wherein the court found that the longshoring industry was of irregular character and held that, because longshore work was employment of recognized intermittence with an element of discontinuousness, computation under 10(c) was proper. Significantly, the court said, at page 554:

> "If Claimant had been recently engaged as longshoreman and his previous employment had been in another class of work and wage scale, his annual earnings in the instant work could only be determined by the earnings of 'other employees' in the same or similar work and class as a basis."

C) *Marshall v. Mahony*, 56 F.2[d] 74 (1932), affirming *Mahony*, above, so far as a 10(c) computation was involved, wherein, as quoted by Employer on brief, the court noted that 10(a) and 10(b) cannot reasonably and fairly be applied to an industry where employment is casual, irregular, seasonal, intermittent and discontinuous.

D) *Luckenbach v. Marshall*, 49 F.2[d] 625 (1931), wherein, as quoted by Employer, the court noted that computation pursuant to 10(b) is proper for employment, the nature of which is steady and regular. However, the factual situation in that case involved longshore work that, at the port in Portland, was irregular and discontinuous, work that dictated computation under 10(c). The element of the decision quoted by Employer was read as being persuasive that the provisions of 10(b) should be followed in the instant matter. The inference drawn by the administrative law judge from record evidence is that decedent was engaged in employment that was regular and steady in nature; he, at the time of his fatal injury, was following an occupation in which he reasonably might have been expected to work at least a year.

E) *Johnson v. Britton*, 290 F.2d 355 (1961), wherein the court found that the construction industry in which the Claimant worked was seasonal, intermittent (because of inclement weather), and one in which workers were paid by the hour and on a day-to-day basis. For those reasons, the court found computation under 10(c) to be proper.

F) *Liberty v. Britton*, 233 F.2d 699 (1956), wherein the court compared the provisions of 10(c) with the companion provision of the New York State Workmen's Compensation Law. That matter involved a claimant who, for a two-year period, worked full-time for an elevator construction firm and part-time for a grocery firm. The court noted that, whereas the New York 10(c)-type statute dealt with employment, the more broad provisions of 10(c) dealt with earnings. Such is the context in which Employer's quotations from the decision are evaluated. So evaluated, they are of no persuasive probative value in resolving a challenge to applicability of 10(b) in the instant matter.

G) *Stutz v. Independent*, 3 BRBS 72 (1975), wherein the Benefits Review Board discussed the propriety of considering earnings as a tavern employee in conjunction with a Claimant's earnings as a "casual longshoreman." Cases referenced by the Board make it clear that computation under 10(c) was under consideration.

Factually, Employer emphasized decedent's "discontinuous" work, his work for a "discontinuous" period, and submitted that such work and period support computation under 10(c). The submission was not supported by the cited cases. In all such cases except *Liberty*, the courts and Board were concerned with the *nature* of employment. There was concern with employment that, *by its nature*, was intermittent, discontinuous, irregular, casual, and/or seasonal, as opposed to work that, by its nature, was steady and regular. "Discontinuous," as used by Employer, was not read as relating to the nature of

decedent's employment by Employer; it was read as relating to the duration of decedent's employment by Employer. By reason of the fact that the concept involved in Employer's submission differed from the concept involved in the cited cases, the cases were determined not to be supportive of the submission.

Rather, the record is considered to be supportive of a factual determination that decedent's employment by Employer was, by nature, steady and regular. It is considered to be supportive of a factual determination that decedent's employment by Employer was not, by nature, intermittent, discontinuous, irregular, casual, and/or seasonal.

Precedent for resolution of Employer's challenge to the order that documents be produced for computation under 10(b) is considered to be found in *O'Hearne v. Maryland Casualty Co. et al.*, 177 F.2d 979, CA4, Nov. 7, 1949. Therein, the claimant had worked for the employer (in employment that was not challenged as being intermittent or discontinuous) for only two days prior to the injury. Employment during the rest of the year preceding the injury included work as a cook and a painter in addition to a period of imprisonment. A deputy commissioner issued an order based on computation of wages under 10(b). A district judge enjoined enforcement of the order on the ground that computation should have been based on 10(c). The court of appeals reversed the district judge and found the deputy commissioner's 10(b) order to be proper.

In view of all the foregoing, it is concluded that Employer has presented no legally supportable justification for modification of the July 1 order requiring Employer to produce documents required for computation of wages pursuant to the provisions of 10(b).

At the August 27 hearing, additional arguments were presented relative to the propriety of use of 10(b) guide-

lines. For the reasons hereinbefore set forth, the administrative law judge ruled that his earlier ruling relating to 10(b) was affirmed. On the basis of his examination and evaluation of documentation then in the record, he ruled that 10(b) reasonably and fairly should be used in computation of decedent's average weekly wages, he rejected the computation that had been effected by Claimant, and he gave counsel the opportunity to effect another computation.

Counsel were unable to agree on identification of the employee, referenced in 10(b), whose wage or salary should be used in the computation. The administrative law judge thereupon determined that the employee whose total payroll earnings most closely equalled those of decedent during the period of decedent's employment by Employer, reasonably and fairly represented the statutory employee.

On that basis, counsel computed and the administrative law judge adopted an average weekly wage totalling $289.00. At that point, Claimant's submission, that the computation should include Employer's contributions to health and welfare, pension and disability, and training trust funds administered by the decedent's union, was rejected by the administrative law judge and he concluded that, at the time of his death, decedent's average weekly wages totalled $289.00.

Claimant's attorney filed a petition for fee that itemized the dates, the services and the hours he and two law clerks devoted to prosecution of the claim. At the August 27 hearing, Employer tendered oral argument in opposition to certain elements of the petition; argument in rebuttal was tendered by Claimant.

The administrative law judge reads the petition and the arguments as having been directed to award of a fee under 33 U.S.C. 928(a) (28(a)). However, the facts in this matter are determined to dictate an award under 33

U.S.C. 928(b)(28)(b)). The record reveals that Employer has paid compensation, without an award, based on average weekly wages, totalling $205.02. Only the amount of compensation, as reflected by the disagreement over determination of the proper average weekly wages, has been put in issue in this claim. The issue has been resolved by the determination that compensation must be based on average weekly wages totalling $289.00.

Under 28(b), the fee must be "based solely upon the difference between the amount awarded and the amount tendered or paid," taking into account the amount of compensation recommended by the deputy commissioner. The record reveals that, during informal proceedings, the deputy commissioner recommended compensation based on average weekly wages totalling $205.92.

Accordingly, it becomes apparent that the professional efforts of Claimant's attorney have resulted in a 40 percent increase in the basis for computation of compensation and a comparable increase in the amount of compensation properly payable.

After consideration and evaluation of the amount of the requested fee, the arguments in opposition and support of that amount and the provisions of 28(b), it is concluded that $2,988.80 constitutes a reasonable fee for services rendered Claimant herein. Award of such a fee is made and approved.

Findings of Fact

As stipulated heretofore in this Decision and Order, the facts to be taken as admitted are found to be established.

On April 19, 1974, decedent's average weekly wages totalled $289.00.

Conclusions of Law

1) On April 19, 1974:

A) Decedent was an employee within the meaning of the Act;

B) Employer was an employer within the meaning of the Act;

C) Decedent suffered an accidental injury that arose out of and in the course of his employment by Employer.

2) Decedent died on April 21, 1974, as a direct result of the injuries suffered on April 19, 1974.

3) At the times of his injury and death, decedent was married to and survived by a widow, Sonia Hilyer, and was the father of and survived by two children, James Jr., and Bryan Hilyer.

Decision

The average weekly wages of decedent, who worked as a laborer for Employer for 5 months and 13 days immediately prior to a fatal injury, but who worked as a food clerk and security guard (for two other employers) for the balance of the year immediately preceding the injury, are to be computed in accordance with the provisions of 33 U.S.C. 910(b).

Order

That, based on April 19, 1974, average weekly wages totalling $289.00 and from April 21, 1974, Employer pay death benefits to the widow and surviving children of decedent, as required by 33 U.S.C. 909.

That, as to any installment of death benefits that was required to be, but was not, paid within 14 days after it became due, Employer pay the recipients an additional amount equal to 10 percent of any such installment.

That, as to any installment of death benefits not paid when due, Employer pay the recipients interest at an annual rate of 6 percent until paid.

That Employer pay George S. Leonard, Esq., $2988.80 for services rendered herein.

/s/ David W. Pelkey
DAVID W. PELKEY
Administrative Law Judge

Dated: September 7, 1976
Washington, D.C.

APPENDIX I

D.C. Code, § 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia.

The provisions of chapter 18 of title 33, U.S.Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. May 17, 1928, ch. 612, § 1, 45 Stat. 600.

U.S. Code, 33 U.S.C. 902(13). Longshoremen's and Harbor Workers' Compensation Act.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. § 902(19).

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

33 U.S.C. § 906. Compensation

Time for commencement

(a) No compensation shall be allowed for the first three days of the disability, except the benefits provided

for in section 907 of this title: *Provided, however,* That in case the injury results in disability of more than fourteen days the compensation shall be allowed from the date of the disability.

Maximum rate of compensation

(b) (1) Except as provided in subsection (c) of this section, compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 910 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

33 U.S.C. 909. Compensation for death

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $1,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16⅔ per centum of such wages for each such child; in case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16⅔ per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

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(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 906(b) of this title but

the total weekly benefits shall not exceed the average weekly wages of the deceased.

(f) All questions of dependency shall be determined as of the time of the injury.

33 U.S.C. § 910. Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employ-

ment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after October 27, 1972, shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

40 U.S.C. 276(b). Davis-Bacon Act.

(b) As used in sections 276a to 276a—5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or

to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a to 276a—5 of this title and other Acts incorporating sections 276a to 276a—5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).